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Supreme Court of the United States

October Term, 1957

No. 676

SOL O. SCHLESINGER,

Petitioner,

—v.—

THOMAS S. GATES, JR., Secretary of the Navy.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

OSMOND K. FRAENKEL,
Attorney for Petitioner.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

To the Chief Justice of the United States and the Associate Justices of the United States Supreme Court:

Petitioner respectfully asks this Court to issue a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit which affirmed a judgment dismissing his complaint.

The Opinions Below

The opinion of the court below has not yet been officially reported. A copy is hereto annexed as Appendix I (pp. 15-17, *infra*). No opinion was rendered by the District Court.

Statement of Grounds of Jurisdiction

(i) The judgment of the Court of Appeals was rendered and entered on September 26, 1957.

(ii) No application for rehearing was made.

(iii) The jurisdiction of this Court is invoked pursuant to 28 U. S. C. § 1254.

Questions Presented for Review

1. Has the Secretary of the Navy any power under existing statutes to debar a contractor from receiving contracts?

2. May the Secretary of the Navy debar a contractor from receiving contracts because he claimed his privilege against self-incrimination when asked by a Congressional Committee to produce certain records?

3. May the Secretary of the Navy debar a contractor from receiving contracts ostensibly because of an alleged default when it appears that his decision was motivated by a request from the chairman of a Congressional Committee before which the contractor had claimed his privilege against self-incrimination when asked to produce certain records?

4. May the Secretary of the Navy debar a contractor from receiving contracts because a contract was terminated under the circumstances appearing in the record?

5. May the Secretary of the Navy debar a contractor from receiving contracts under the procedures shown by the record?

6. Has a person standing to review the action of the Secretary of the Navy debarring him from receiving contracts?

Statutes and Regulations Relied On

1. Administrative Procedure Act, § 9(a), 5 U. S. C. § 1008.

2. Armed Services Procurement Act, § 3, 41 U. S. C. § 152.

3. Armed Services Procurement Regulations, Section 1.604, 32 C. F. R. 1.604.

4. Armed Services Procurement Regulations, Section 7.103-12, 32 C. F. R. 7.103-12.

These various provisions are set forth in full in Appendix II (pp. 19-23, *infra*).

Statement of the Case

Petitioner brought this action for a declaratory judgment and an injunction to terminate his debarment from receiving contracts and to expunge the same (R. 5).* Both parties moved for summary judgment on the basis of the complaint and the papers filed in connection with petitioner's application for a preliminary injunction (R. 56, 57). Petitioner's motion was denied and that of defendant granted, without opinion (R. 58).

Petitioner for many years had been conducting a cap manufacturing business known as Ideal Uniform Cap Company, which his father and grandfather had conducted before him (R. 2, 12). During the five years prior to the debarment contracts with the government constituted approximately 80% of that business (R. 11, 51). A contract for the manufacture of caps was issued to petitioner which called for deliveries to commence in May 1955 and continue monthly (R. 22). This contract resulted from a bid originaly submitted February 24th (R. 19), with deliveries to commence in April (R. 21). Petitioner gave the government five extensions of time within which to act on his bid before he was notified by telephone on April 14th (R. 19) that he had been awarded the contract. The formal award was not received until May 3rd (R. 22).

On June 14th, no deliveries having been received in May, the contracting officer sent a warning letter (R. 24, 25). This letter requested information about dates when deliveries could be expected. Petitioner informed the contracting officer on June 23rd that he would reply to the

* The references are to the Joint Appendix in the court below.

letter in a few days and was told "that was perfectly all right" (R. 25).

When petitioner received the letter of June 14th he had been requested to appear before the Permanent Subcommittee on Investigations of the Committee on Government Operations of the Senate in connection with an inquiry into "procurement practices" and he appeared before it on June 21st and 23rd (R. 25, 53, 55). He testified fully except that he pleaded his privilege when asked to produce certain records because he was under income tax investigation (Senate Report No. 1380, 84th Congress, 2d Session, p. 979).

On June 28th petitioner answered the letter of the 14th asking for an adjustment of delivery dates (R. 26). Prior to the receipt of that letter the contracting officer was advised by a superior that Senator McClellan had written the Navy Department "implying that the contract should be cancelled" (R. 27). On June 29th the Navy announced that it had written the Senator that this would be done and petitioner debarred (R. 56).*

The contracting officer then ascertained that the caps were for reserve stock and were not urgently needed, reported this to his superior, and was instructed to check with legal counsel to see if the contract could not be terminated for default (R. 27). On June 30th the contracting officer received a telegram from the Bureau of Supplies and Accounts directing him to terminate the contract (R. 28).

Petitioner was notified of the termination by telegram on July 1st and by letter on July 9th (R. 29). On July

* It is significant that on that day it was not yet known whether any deliveries had actually been made in June. And the Armed Services Board of Contract Appeals rejected the government's contention that the letter of June 14th constituted a notice justifying termination of the contract for non-delivery in May (R. 30-32, 39, 40). The Board did, however, find that the termination for non-delivery in June was justified (R. 40).

28th he appealed that action (R. 30). After the Appeals Board's unfavorable decision of October 31st (R. 42) petitioner sued in the Court of Claims, contending that the termination of the contract was arbitrary (R. 7-11). The issues thus raised have not yet been determined.

While petitioner's appeal was pending the Secretary of the Navy, on August 10, 1955, wrote him that he had been debarred from receiving contracts until June 30, 1956 (R. 6). This letter (set forth as an exhibit to the complaint—R. 2, 6), states two reasons for the action: the refusal to answer questions and produce records before the Senate Committee on Government Operations on the invocation of the privilege against self incrimination; default under the above described contract. Under the Regulations this debarment operated throughout the Department of Defense (see p. 20, *infra*).

The debarment notice contained no provision for hearing (see R. 6), although the applicable Regulation provides that it shall give the contractor an opportunity to be heard (1.604-3, *infra*, p. 22). While petitioner protested his debarment both to officials of the Department (R. 48, 49) and to the Comptroller General (R. 2), he never had a hearing.

Subsequently petitioner submitted bids on other government contracts but was informed that he was disqualified because of this debarment (R. 4, 12, 50).

The complaint alleges that the action of the Secretary of the Navy has resulted in severe damage to petitioner's credit and has seriously affected his business (R. 4) and that this will not be remedied merely by the expiration of the debarment by lapse of time, but will remain unless the debarment is declared illegal (R. 5). Similar statements are contained in petitioner's affidavits in support of his application for a preliminary injunction (R. 12, 13, 51). And in support of that application he also submitted an affidavit from his insurance broker to the effect that, because of the debarment, it was impossible for petitioner to obtain a performance bond and that his fire insurance poli-

cies had been cancelled for the same reason (R. 51, 52). Attached to that affidavit was a Dun & Bradstreet report (R. 52-56).

That report stresses the barring of petitioner and ties that up with the invocation of the Fifth Amendment (R. 53, 55). Indeed, the report indicates that on June 29th the Navy had written to Senator McClellan that it was going to cancel the contract and debar petitioner (R. 56). All the financial matters discussed in the report were favorable to petitioner.

It should be noted that in February 1956 petitioner was accepted by the Navy as a subcontractor of his surety for the completion of the original contract (R. 3, 12).

In the court below it was assumed that petitioner had standing to question his debarment and that this could not be justified by reliance on petitioner's invocation of his privilege. The Court of Appeals, however, affirmed the dismissal of the complaint on the ground that the Secretary had power to debar because of default in deliveries (see *infra*, pp. 16, 17).

Jurisdiction of the Courts Below

The District Court had jurisdiction under 5 U. S. C. § 1009 and District of Columbia Code, Title 11, §§ 305, 306. The Court of Appeals had jurisdiction under 28 U. S. C. § 1291.

Reasons Relied On

The decision below is in conflict with applicable decisions of this Court.

The court below has decided an important question of federal law which has not been, but should be, settled by this Court, namely, whether the Secretary of the Navy has any power to debar a manufacturer from receiving con-

tracts and, if he has any such power, the circumstances under which it may be exercised.*

The importance of this case is manifest because of the extent to which administrative agencies now claim the right to debar and the breadth of the decision below. In addition to the Armed Forces, which purport to act under the authority of the Armed Services Procurement Regulations, the Secretary of Labor has set up regulations [25 C. F. R. 56(b)] to debar persons who have violated the Anti-Kickback Act (18 U. S. C. § 874) and the 8-Hour Day Act (40 U. S. C. § 321), although neither of those statutes contains any provisions for debarment. In addition, the General Services Administration has issued regulations dealing with debarment (G. S. A. Gen. Reg. No. 15 § 5).

That the power to debar constitutes a severe sanction and can be ruinous to a business was recognized with reference to one of the statutes which does authorize debarment, namely, the Walsh-Healey Act (41 U. S. C. § 37). The Attorney General's Committee on Administrative Procedures, in discussing this, said:

> "* * * The withholding of Government business may be an extremely drastic, if not altogether ruinous penalty. It has been so recognized by the Secretary and accordingly been little employed * * * the penalty of blacklisting is so severe that its imposition may destroy a going business." (Senate Document 186, 76th Cong., 3d Session.)

The Comptroller General has also taken the view that the debarment provision of the Walsh-Healey Act constitutes

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* As the Court of Appeals (*infra*, p. 16) assumed that petitioner had standing to sue we will reserve that issue for elaboration should this Court grant our application, noting only here that this Court has permitted persons to sue to remove stigmas—as in *United States* v. *Lovett*, 328 U. S. 303; *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U. S. 123; and *Peters* v. *Hobby*, 349 U. S. 331. *Cf. Friend* v. *Lee*, 221 F. 2d 486.

a sanction, having said: " * * * it is in the nature of a punishment or penalty * * * " (33 Comptroller General, 63, 65).

For an extensive discussion of the whole subject we call attention to the article "The Government Blacklist" by Gantt & Panzer, 25 George Washington Law Review, 175.

An opportunity therefore exists in this case to limit this drastic power before it mushrooms to unmanageable proportions.

1. No provision of law grants the Secretary of the Navy the power to debar persons from contracting with the government. The court below, without any discussion of the problem, found such power in Sections 151 and 152 of the Armed Services Procurement Act (*infra*, p. 17, note 2) and in the Regulations issued thereunder (id. note 3). While the Regulations do contain specific provisions with regard to debarment, the statute does not. Nor, we submit, do the Regulations sustain the action here taken.

These sections of the statute* deal with all contracts with various departments of the government, including the Armed Forces. They require advertising for bids except under certain circumstances. The Court below referred particularly to the reference to "responsible bidder" in Section 152(b). That phrase is also used in Section 151(c)(15), but is not defined in the statute (see Section 158). However, in the Senate Report on the Armed Services Procurement Act, No. 71, 80th Congress, 2d Session, it was said:

> " * * * The question whether a particular bidder is a 'responsible bidder' requires sound business judgment, and involves, an evaluation of the bidder's experience, facilities, technical organization, reputation, financial resources, and other factors."

* These were repealed in 1956 and replaced by 10 U. S. C. § 2301-5.

We are at a loss to see how this phrase, casually referred to in the statute, can be twisted into an authorization to blacklist anyone who, for one reason or another, might be rejected as not a responsible bidder.

It is significant that in requiring a warranty from contractors that no commissions or contingent fees had been agreed upon, Congress declared only that the contract might be annulled for breach of such warranty (Section 153), not that the offender might be blacklisted.

Moreover, when Congress wanted to permit an administrative agency to blacklist persons dealing with it, it did so by a grant of express authority: Walsh-Healey Act, 41 U. S. C. § 37; Davis-Bacon Act, 40 U. S. C. § 276a-2; Buy American Act, 41 U. S. C. § 10b(b).

Finally, the Administrative Procedure Act (5 U. S. C. § 1008(a), *infra*, p. 49) expressly prohibits the imposition of any "sanction" except as authorized by law.

In the article previously mentioned by Gantt & Panzer the view is expressed that there is no authority in existing law for administrative regulations providing for debarment when no statute expressly give such power. In 25 George Washington Law Rev. at page 182 the authors say:

> "However, the writers believe that express legislation should be employed with regard to sanctions and penalties as drastic as debarment and suspension."

And again at page 204:

> "Administrative debarment or suspension, not expressly sanctioned by statute, is susceptible of abuse and chaotic variance among agencies and should not be permitted."

We believe that the decision of the court below is in conflict with prior decisions of this Court. As long ago

as in *Keppel* v. *Tiffin Savings Bank*, 197 U. S. 356, this Court said at page 362:

> "* * * a person or corporation is not to be subjected to a penalty unless the words of the statute plainly impose it."

In *Priebe & Sons* v. *United States*, 332 U. S. 407, the problem was almost the same as the one here presented. There the government claimed authority for the insertion of an oppressive penalty clause by reason of the procurement powers contained in the Lend-Lease Act. In rejecting that claim Mr. Justice Douglas said at page 413:

> "It is said, however, that a different rule should obtain here because of the broad procurement powers involved under the Lend-Lease Act. We are pointed, however, to no provision by which the Congress authorized the imposition of penalties as sanctions to that program; nor do we find any. We cannot infer such a power. The power to purchase on appropriate terms and conditions is, of course, inferred from every power to purchase. But if that is the source of congressional authority to impose penalties, then any procurement officer, in war or in peace, could impose them. That is contrary to the premise underlying all our decisions on this question which involve government contracts. The rule which they announce has been applied both to the exigencies of war (*United States* v. *Bethlehem Steel Co.* [205 U. S. 105]) and of peace (*Wise* v. *United States* [249 U. S. 361]). The other view is such a radical break with the past and so counter to the whole development of the law as to indicate that the congressional purpose should be plain before we take the step."

See also *Wallace* v. *Cutten*, 298 U. S. 229; *Hannegan* v. *Esquire, Inc.*, 327 U. S. 146; *Peters* v. *Hobby*, 349 U. S. 331; *Leedom* v. *International Union*, 352 U. S. 145; *Cf. Farmer* v. *United Electrical etc. Workers*, 211 F. 2d 36, cert. den. 347 U. S. 943.

Surely the issue here presented is of the greatest importance and requires consideration by this Court.

2. Even under the Regulations (*infra*, pp. 20, 21) there was no authority to take the action here complained of. These contain nothing which by any stretch of the imagination would justify basing the debarment on petitioner's invocation of the Fifth Amendment. And *Slochower* v. *Board of Higher Education*, 350 U. S. 551, stands in the way of such justification, even had it been based on statutory authority.

While the court below did not "reach" this question (*infra*, p. 17, note 4), we submit that it cannot be avoided, since the action taken against petitioner derived solely from his claim of privilege. Had he not made that claim he would never have been debarred.* The inference is inescapable, moreover, that absent the pressure from Senator McClellan his contract would not even have been terminated. It is, therefore, not possible to view the two bases of the debarment letter in isolation as did the court below.

Moreover, even if the "default" aspect of the case be considered by itself, it does not support the action taken. For the Regulations authorizing debarment do not permit it for mere default, not even for one which might justify termination of a contract. The Regulations on this subject set forth three grounds for debarment (*infra*, pp. 20, 21). The first and third (conviction for certain crimes, debarment by another agency) are not claimed to be applicable. We quote the second in full:

> "(b) Clear and convincing evidence of violation of contract provisions, as set forth below, when such violations are of a character regarded by the Secre-

* Messrs. Gantt & Panzer in the article already referred to appear to have been of the same view, for they say at p. 187, speaking of the default ground of the debarment: "It is doubtful that the debarment action would have been taken on the first ground."

tary of the Department involved, or his authorized representative, to be so serious as to justify debarment actions:

"(1) Wilful failure to deliver in accordance with the specifications or within the times of delivery provided in a contract.

(2) A history of failure to perform or of unsatisfactory performance in accordance with the terms of one or more contracts, provided that the previous failure or failures by the Contractor are within a reasonable period of time preceding the determination to debar. Failure to perform caused by acts beyond the control of the Contractor shall not be considered.

(3) Violation of the contractual provision against contingent fees.

(4) Violation of the contractual provision against gratuities, as determined by the Secretary of a Department in accordance with the provisions of the GRATUITIES clause."

The last two of these grounds are clearly inapplicable. And we submit that the record will be searched in vain for any evidence that petitioner's failure to deliver was "wilful" or constituted a "history" of unsatisfactory performance, much less the "clear and convincing evidence" required by the Regulations.

The conclusion that the decision to debar was arbitrary is inescapable. Not only did the government delay in acting on the bid (R. 19), but it did not give the order to complete the contract until February 1956 (R. 3, 12), more than seven months after the termination. Moreover, petitioner had requested an adjustment of the delivery dates (R. 26) which was never acted on, and had appealed the termination order (R. 30).*

Indeed, the decision to debar appears not to have been the result of any independent judgment at all, but to have

* Pending the appeal to the Secretary and possible court review the decision to terminate the contract did not become final (see Regulations, Section 7.103-12, *infra*, pp. 22, 23).

been prompted by pressure from Senator McClellan (R. 27, 53, 55, 56). Pertinent is the language of this Court in *Priebe & Sons* v. *United States*, *supra*, at 413, that "an exaction of punishment for a breach which would produce no possible damage has long been deemed oppressive and unjust."

The sum and substance of the matter is that petitioner is the victim of the prejudices generated by the use of his privilege against self-incrimination. This Court has recently on several occasions felt the need for reminding the nation of the impropriety of such prejudice. As Mr. Justice Frankfurter said in *Ullmann* v. *United States*, 350 U. S. 422, 426:

> "* * * Too many, even those who should be better advised, view this privilege as a shelter for wrongdoers. They too readily assume that those who invoke it are either guilty of crime or commit perjury in claiming the privilege. Such a view does scant honor to the patriots who sponsored the Bill of Rights."

Cf. *Quinn* v. *United States*, 349 U. S. 155; *Grunewald* v. *United States*, 353 U. S. 391.

While the courts may not be able to protect persons against the impact of such prejudice in private life, they can and have done so when public agencies are involved: *Slochower* v. *Board of Higher Education*, supra; *Grunewald* v. *United States*, supra;

And, we respectfully submit, it is the duty of the courts to do so in all cases. Only the intervention of this Court here will protect this petitioner against the consequences of that prejudice.

3. The procedure adopted by the Secretary raises two questions: Did the notice comply with the Regulations? Can he debar without prior hearing? In the court below the second question was ignored and the first disposed of

by a holding (*infra*, p. 17) that the informal conferences cured any defect in the notice. It should be noted in this connection, however, that by the time these conferences were held in July the damage had been done by the public announcement that petitioner would be debarred (R. 56).

On this aspect of the case we urge now only that so serious a penalty as debarment should not be imposed until after a hearing so that the determination be based on a considered judgment with the benefit of argument on behalf of the contractor. Cf. *Morgan* v. *United States*, 304 U. S. 1; *Joint Anti-Fascist Committee* v. *McGrath*, *supra*.

Messrs. Gantt & Panzer in the article already several times discussed are of the view that no debarment should be possible without prior hearing even in those cases where it is authorized by statute, saying at p. 204: "* * * that no sanction should be imposed except after opportunity for hearing and that judicial review should be provided."

The importance of this aspect of the case in relation to all of the possible debarment procedures, both under the various statutes which authorize debarment and the regulations issued without statutory authorization, can hardly be minimized.

CONCLUSION

Since this case presents important questions concerning the power of a government agency to blacklist private persons and the circumstances justifying the exercise of that power as well as the manner of its exercise, if it here exists at all, the within application should be granted.

Respectfully submitted,

Dated, December 18, 1957.

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APPENDIX I

Opinion of Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

(Decided September 26, 1957)

MR. BURTON R. THORMAN for appellant.

MR. MARCUS A. ROWDEN, a member of the bar of the Supreme Court of Michigan, pro hac vice, by special leave of Court, with whom ASSISTANT ATTORNEY GENERAL DOUB, MESSRS. OLIVER GASCH, United States Attorney, and MELVIN RICHTER, Attorney, Department of Justice, were on the brief, for appellee. MR. LEWIS CARROLL, Assistant United States Attorney, also entered an appearance for appellee.

Before:

PRETTYMAN, BASTIAN and BURGER,
Circuit Judges.

PER CURIAM:

This is an appeal from a summary judgment granted appellee on appellant's suit for a declaratory judgment. Appellant sued to compel the appellee Secretary of the Navy to terminate appellant's allegedly illegal listing and debarment from obtaining Navy contracts and to expunge from the records any manifestation of such adverse action by the Navy.

The debarment notice, dated August 10, 1955, stated two unrelated grounds for the action: (1) appellant's refusal to answer questions and to produce his business records when testifying before a Senate subcommittee investigating

armed services' procurement practices and Schlesinger's performance of his contracts; and (2) appellant's default under an existing contract with the Navy Department. Appellant had been notified on July 1, 1955, that his contract was terminated for default in performance and his appeal therefrom was subsequently denied by the Armed Services Board of Contract Appeals.[1] The record indicates appellant protested the debarment to the Comptroller General and had several conferences with Navy Department officials, at which time he presented information to show why the debarment should be lifted.

Appellant contends the Secretary lacked statutory and regulatory authority to debar him for the stated causes; that the debarment was arbitrary and capricious since it was issued during the course of appellant's administrative appeal from the contract termination order; that the debarment was procedurally defective under applicable administrative provisions; and that a debarment without a hearing deprived him of due process and constituted cruel and inhuman punishment.

The Secretary urges that appellant as a contractor or prospective contractor has no standing to contest the debarment and, in any case, that the debarment was in accordance with the Armed Services Procurement Act and pertinent regulations. We will assume for present purposes, without so deciding, that appellant has standing to maintain this suit. The Secretary of the Navy is authorized to debar contractors for breach of contract under the Armed Services Procurement Act,[2] and implementing regulations.[3]

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[1] This decision was dated October 31, 1955. Appellant subsequently petitioned the Court of Claims, which action is still pending.

[2] 62 STAT. 21 (1948), 41 U. S. C. § 151 *et seq.* (1952). See especially 41 U. S. C. § 152(b), providing that contract awards are to be made to "responsible bidder[s]."

[3] See Armed Services Procurement Regulations § 1.604(b)(2), 32 C. F. R. 1.604-1(b)(2).

We need not go beyond the statute and regulations to sustain the debarment in the instant case on the grounds of appellant's default in performance.[4]

The regulations also provide that "The notice [of debarment] shall * * * afford the contractor a reasonable opportunity to present information for consideration in his behalf."[5] The record discloses substantial compliance with this requirement. Appellant had several conferences and interviews with Navy Department officials on which occasions the debarment and justification therefor were considered and appellant was afforded an opportunity to present evidence. It follows that the District Court correctly granted summary judgment to the appellee, and the order of the District Court is therefore

Affirmed

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[4] Absent a regulation or contract provision making refusal to furnish information and records about the performance of a government contract a basis for termination and debarment it is not clear whether refusal to furnish records to a Congressional Committee could lead to debarment. We need not and do not reach this question.

[5] Armed Services Procurement Regulations § 1.604-3, 32 C. F. R. 1.604-3. The effect of the regulation is that it calls for a notice to the contractor affording him an opportunity to be heard and invokes temporary debarment pending that hearing; a favorable decision lifts the temporary debarment.

Judgment of the Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13,483 April Term, 1957

C. A. 1647—56

SOL O. SCHLESINGER, t/a IDEAL UNIFORM CAP COMPANY,
Appellant,

v.

THOMAS S. GATES, JR., Secretary of the Navy,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Before:

PRETTYMAN, BASTIAN and BURGER, *Circuit Judges*

THIS CAUSE came on to be heard on the record from the United States District Court for the District of Columbia, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is ordered and adjudged by this Court that the order of the said District Court appealed from in this cause be, and the same is hereby, affirmed.

Dated: September 26, 1957.

Per Curiam

UNITED STATES COURT OF APPEALS
For the
District of Columbia Circuit
Filed: September 26, 1957
JOSEPH W. STEWART,
Clerk.

APPENDIX II

1. Section 9(a) of the Administrative Procedure Act, Act of June 11, 1946, c. 324, Sec. 9, 60 Stat. 242, U. S. C. A. Title 5, Sec. 1008 (a) provides:

> "(a) In General—No sanction shall be imposed or substantive rule or order be issued except within jurisdiction delegated to the agency and as authorized by law."

2. Section 3 of the Armed Services Procurement Act of 1947, Act of Feb. 19, 1948, c. 65, Sec. 3, 62 Stat. 22, U. S. C. A., Title 41, Sec. 152, provides:

> "Sec. 3. Whenever advertising is required—
>
> "(a) The advertisement for bids shall be a sufficient time previous to the purchase or contract and specifications and invitations for bids shall permit such full and free competition as is consistent with the procurement of types of supplies and services necessary to meet the requirements of the agency concerned.
>
> "(b) All bids shall be publicly opened at the time and place stated in the advertisement. Award shall be made with reasonable promptness by written notice to that responsible bidder whose bid, conforming to the invitation for bids, will be most advantageous to the Government, price and other factors considered: *Provided*, That all bids may be rejected when the agency head determines that it is in the public interest so to do."

3. Section 1-604, Armed Services Procurement Regulations (1955 edition), 32 C. F. R. 1.604, provides:

> "1-604 Causes and Conditions Under Which Departments May Debar Contractors. The Secretary of each Department or his authorized repre-

sentative is authorized to debar in the public interest a firm or an individual for any of the causes and under all conditions set forth below. Debarment of a firm or individual by the Secretary of a Department or his authorized representative shall operate to debar such firm or individual throughout the Department of Defense.

"*1.601-1 Causes for Debarment.*

(a) Conviction by or a judgment obtained in a court of competent jurisdiction for (i) commission of fraud or a criminal offense as an incident to obtaining, attempting to obtain, or in the performance of a contract; and (ii) violation of the Federal antitrust statutes arising out of the submission of bids or proposals. In the event appeal taken from such conviction or judgment results in reversal, the debarment shall be removed upon receipt of notification thereof. (Note, however, that the foregoing do not necessarily require that the firm or individual be debarred, and that the decision to debar is still within the discretion of the Secretary of the Department concerned, or his authorized representative. The seriousness of the offense, the civil satisfaction received by or available to the Government, and all mitigating factors should be considered in making the determination to debar.)

(b) Clear and convincing evidence of violation of contract provisions, as set forth below, when such violations are of a character regarded by the Secretary of the Department involved, or his authorized representative, to be so serious as to justify debarment actions:

(1) Wilful failure to deliver in accordance with the specifications or within the times of delivery provided in a contract.

(2) A history of failure to perform or of unsatisfactory performance in accordance with the terms of one or more contracts, provided that the previous failure or failures by the Contractor are within a reasonable period of time preceding the determination to debar. Failure to perform caused by acts beyond the control of the Contractor shall not be considered.

(3) Violation of the contractual provision against contingent fees.

(4) Violation of the contractual provision against gratuities, as determined by the Secretary of a Department in accordance with the provisions of the GRATUITIES clause.

(c) Debarment for any of the above causes by some other executive agency of the Government. Such debarment may be based entirely upon the record of facts obtained by the original debarring agency, or upon a combination of additional facts with the record of facts of the original debarring agency.

"*1.604-2 Period of Debarment.* All debarments shall be for a reasonable, definitely stated period of time, commensurate with the seriousness of the offense. As a general rule, a period of debarment shall not exceed 5 years following the date of conviction for fraud or other criminal offense, or 3 years following the date of debarment for any other cause. In the event debarment is preceded by suspension, consideration will be given to such period of suspension in determining the period of debarment.

"*1.604-3 Notice of Debarment.*

(a) The firm or individual concerned shall be furnished with written notice of the debarment within

30 days after determination of debarment has been made. The notice shall state, as a minimum, (i) the period of debarment, including effective dates; (ii) the reasons for debarment, including a statement of the specific instances of dereliction; and (iii) that the debarment is effective throughout the Department of Defense. The notice shall also afford the contractor a reasonable opportunity to present information for consideration in his behalf.

(b) Copies of the notice of debarment action taken under the authority of subparagraphs (c) and (d) of ASPR 1-602 and of any removals from such debarments shall be furnished to the General Services Administration."

4. Section 7.103-12, Armed Services Procurement Regulations (1955 edition), 32 C. F. R. 7.103-12 sets forth the following clause required to be inserted in all fixed-price supply contracts of the Defense Department agencies:

"*Disputes*

"Except as otherwise provided in this contract, any dispute concerning a question of fact arising under this contract which is not disposed of by agreement shall be decided by the Contracting Officer, who shall reduce his decision to writing and mail or otherwise furnish a copy thereof to the Contractor. Within 30 days from the date of receipt of such copy, the Contractor may appeal by mailing or otherwise furnishing to the Contracting Officer a written appeal addressed to the Secretary, and the decision of the Secretary or his duly authorized representative for the hearing of such appeals shall, unless determined by a court of competent jurisdiction to have been fraudulent or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith, or not supported by substantial evidence, be final and con-

clusive: *provided* that, if no such appeal is taken, the decision of the Contracting Officer shall be final and conclusive. In connection with any appeal proceeding under this clause, the Contractor shall be afforded an opportunity to be heard and to offer evidence in support of its appeal. Pending final decision of a dispute hereunder, the Contractor shall proceed diligently with the performance of the contract and in accordance with the Contracting Officer's decision."

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No. 676

In the Supreme Court of the United States

OCTOBER TERM, 1957

SOL O. SCHLESINGER, PETITIONER

v.

THOMAS S. GATES, JR., Secretary of the Navy

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR THE RESPONDENT IN OPPOSITION

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BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The order of the District Court granting the Government's motion for summary judgment (R. 58) is not reported. The opinion of the Court of Appeals (Pet. 15-17) is reported at 249 F.2d 111.

JURISDICTION

The judgment of the Court of Appeals was entered on September 26, 1957 (Pet. 18). The petition for a writ of certiorari was filed on December 20, 1957. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, under the Armed Services Procurement Act of 1947, 62 Stat. 21, 41 U.S.C. 151, *et seq.*, the Defense Department has the power to debar prospective contractors for reasons which the appropriate officials of that Department have determined render a contractor non-responsible.

2. Whether, in debarring petitioner from receipt of Navy Department contracts, the action of the Secretary of Navy comported with the relevant Armed Services Procurement Regulations, 32 C.F.R. 1.100, *et seq.*

STATUTES AND REGULATIONS INVOLVED

The relevant provisions of the Armed Services Procurement Act of 1947, 62 Stat. 21, 41 U.S.C. 151, *et seq.*, and the pertinent Armed Services Procurement Regulations, 32 C.F.R. 1.100, *et seq.*, are set forth in the Appendix, *infra*, pp. 17-20.

STATEMENT

This action was brought by petitioner, a manufacturer of uniform caps, to compel the Secretary of the Navy to terminate petitioner's allegedly unlawful debarment from obtaining Navy Department contracts and to expunge from the records of the Department the indicia of that debarment. The District Court for the District of Columbia denied petitioner's motion for summary judgment and granted the Secretary's cross-motion (R. 58). This judgment was affirmed, *per curiam*, by the Court of Appeals for the District

of Columbia Circuit (Pet. App. 18). The relevant facts, as alleged in the pleadings, and the proceedings below may be summarized as follows:

Schlesinger is engaged in the business of manufacturing and selling uniform caps, under the name Ideal Uniform Cap Company, his principal customer being the Government (R. 1-2). By letter dated August 10, 1955, petitioner was notified by the Department of the Navy that he had been debarred from receiving Navy contracts until June 30, 1956 (R. 6-7). The letter, which stated that this debarment was effective throughout the Department of Defense, gave two grounds therefor. First, it was asserted, Schlesinger had refused to answer questions and make his books and records available to the Investigations Subcommittee of the Permanent Senate Committee on Government Operations,[1] and had pleaded the Fifth Amendment in connection with an income tax investigation relating to the profits from his business. The second ground for debarment specified that Schlesinger was in default under a prior contract with the Navy Department (R. 6-7). The cap supply contract in question had been terminated by the Navy Department on July 1, 1955, for default on the part of the contractor—Schlesinger having failed to deliver 15,000 caps by May 31, 1955, and having again failed to deliver 15,000 caps by June 30, 1955, as required

[1] The investigation covered the procurement practices of the Armed Services Textile and Apparel Procurement Agency, and concerned itself with evidence of waste, inefficiency, graft, and corruption relative thereto. S. Rep. No. 1380, 84th Cong., 2d Sess.

by the terms of the contract. (R. 28, 39-40). See, *infra*, pp. 9-11.

Petitioner "promptly protested the action of the Department of the Navy in debarring him to the Comptroller General of the United States" (R. 2), and also had numerous discussions and conferences with Navy Department officials who were charged with responsibility in the matter (R. 48-49). In conjunction with the foregoing, petitioner and his attorney presented, in detail, Schlesinger's views as to why he should not have been debarred (R. 48-49). These protests were unsuccessful in having the debarment rescinded (R. 2, 48-49).

On April 20, 1956, the present action was instituted in the District Court (R. 1-5). The complaint alleged that the debarment action of the Navy Department was wrongful, in that under the pertinent Armed Services Procurement Regulations (ASPR) the petitioner's conduct before the Senate Subcommittee in refusing to produce his books and records, and his pleading of the Fifth Amendment, did not constitute grounds for debarment (R. 4). It was further contended that the question of petitioner's default under a specific Navy supply contract was in dispute before an administrative board at the time of debarment and was, at the time of the filing of the complaint, pending before the Court of Claims (R. 3-4). See, *infra*, pp. 10-11. Petitioner charged that the Secretary's action was in violation of the Fifth and Eighth Amendments, and alleged additionally that the notice of debarment was procedurally defective in that it did not comply with Defense Department regulations requir-

ing that the debarment notice shall, *inter alia*, "afford the contractor a reasonable opportunity to present information for consideration in his behalf" (R. 4). *Infra*, p. 20. Schlesinger requested that the court declare the debarment to be unauthorized and illegal, and order its termination for the balance of the debarment period (two months and ten days), and also that the court require that the debarment be expunged from the records of the Navy and Defense Departments (R. 5).

Subsequent to the filing of affidavits by both parties, first petitioner and then the Secretary moved for summary judgment (R. 56-57). The District Court denied Schlesinger's motion, and granted the Secretary's cross-motion which was based upon petitioner's lack of standing to sue and the propriety of the debarment under the applicable statute and regulations (R. 58).

On appeal, the Court of Appeals for the District of Columbia Circuit affirmed, *per curiam* (Pet. 18). The appellate court, assuming "for present purposes, without so deciding, that appellant has standing to maintain this suit" (see *infra*, p. 6), held that the Secretary was authorized to debar contractors for breach of contract under the Armed Services Procurement Act and implementing regulations, and that Schlesinger's default in performance was sufficient to sustain the Secretary's debarment action (Pet. 16-17).[2] The court further held, on the basis of the

[2] The court commented marginally, that although "[w]e need not and do not reach this question", in the absence of a regulation or contract provision making refusal to furnish

undisputed record, that there had been substantial compliance with the regulation which provides that the contractor is to have "a reasonable opportunity to present information for consideration in his behalf" (Pet. 17).

ARGUMENT

The court below, in upholding petitioner's long-expired debarment as a lawfully-authorized consequence of his prior contract default, has sustained the Secretary's action on a narrowly circumscribed basis.[3] The ground chosen, nevertheless, is sufficient

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information and records about the performance of a Government contract a basis for termination and debarment, it is not clear whether refusal to furnish records to a Congressional Committee could lead to debarment (Pet. 17).

[3] The Government had contended that petitioner lacked standing judicially to contest what was, in effect, a refusal on the part of the Defense Department to do business with him. Reliance was placed upon the well-established principle that prospective bidders on Government contracts have no litigable rights arising out of the refusal of Government officers to deal with them, and that statutes and regulations governing the contracting procedures of these officers are enacted solely for the benefit of the Government and confer no enforceable rights upon persons dealing with it. See *Perkins* v. *Lukens Steel Co.*, 310 U.S. 113; *B. F. Cummins Co.* v. *Burleson*, 40 App. D.C. 500; *Friend* v. *Lee*, 221 F. 2d 96 (C.A.D.C.); *Wooldridge Manufacturing Co.* v. *United States*, 235 F. 2d 513 (C.A.D.C.). In view of the sufficiency of petitioner's default as a basis for debarment, the Court of Appeals found it unnecessary to pass on this point or, as noted above, to determine whether petitioner's refusal to furnish records and information relative to performance of a Government contract to a Congressional committee was a lawful debarment ground (Pet. 16-17).

by itself and derives full support from the relevant provisions of the Armed Services Procurement Act of 1947, and the implementing regulations.

1. Petitioner's primary contention is that debarment of contractors by the Armed Services has no statutory foundation. In meeting this argument, initial consideration must be given to Section 3(b) of the 1947 Act, 41 U.S.C. 152(b) (*infra*, p. 17).[1] It is there provided that contract awards made pursuant to advertisement for bids, the basic procurement device, are to be made "to that responsible bidder whose bid, conforming to the invitation for bids, will be most advantageous to the Government, price and other factors considered." *Infra*, p. 17. The scope of this authorization, with its deliberately flexible criteria, is best defined by the report of the Senate Armed Services Committee accompanying the bill which was subsequently enacted into law. S. Rep. No. 571, 80th Cong., 1st Sess. This report describes Section 3 of the Act in the following terms (at p. 16):

> This section establishes broad standards for advertising. * * * Other matters which may properly be covered by administrative regulations include the rejection of offers of any person who as principal or surety has been a defaulter on previous contracts with the Depart-

[1] On August 10, 1956, Congress enacted into positive law, as Title 10 of the United States Code, a codification of the laws relating to the Armed Forces, including those laws governing procurement. 70A Stat. 1, *et seq.* The relevant provisions of the Armed Services Procurement Act of 1947 are now found in 10 U.S.C. 2301-2314. No substantive change has been made in the 1947 Act by the codification.

ment, rejection of bids having nominal or fictitious prices, and barring as a contractor a person who is not a manufacturer or a regular dealer in the articles which he offers to supply.

Section 3(b) states that contracts shall be awarded to the lowest responsible bidder whose bid will be most advantageous to the Government, price and other factors considered, and that the Government may reject all bids when such action is deemed advisable. The question whether a particular bidder is a "responsible bidder" requires sound business judgment, and involves an evaluation of the bidder's experience, facilities, technical organization, reputation, financial resources, and other factors. The service concerned with the procurement of goods of the type dealt in by the bidder is naturally best qualified to make this evaluation, and broad discretion is accordingly reserved to the service in this respect. In virtually all cases this will result in an award to the lowest responsible bidder. However, it will also provide for situations where the public interest dictates an award to someone other than the lowest responsible bidder.

Thus, it is plain that, while Congress has enjoined in certain other statutes, which promote specific social or economic goals, that contractors violating the provisions of those statutes are to be denied receipt of Government contracts,[5] under the

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[5] Walsh-Healey Act, 49 Stat. 2037, 41 U.S.C. 37; Davis-Bacon Act, 46 Stat. 1494, as amended, 49 Stat. 1011, 40 U.S.C. 276a-2; Buy American Act, 47 Stat. 1520, 41 U.S.C. 10b(b).

basic procurement act for the Armed Services, Congress purposefully left to administrative determination the decision as to which other categories of contractors the Defense Department will not deal with and the grounds for non-dealing. Pursuant thereto, regulations were issued by the Defense Department to implement its statutory functions and responsibilities.[6] These regulations, as held by the court below, authorized the action taken by the Secretary in the present case.

2. Section 1.604-1(b)(2) of the Armed Services Procurement Regulations (ASPR) provides that the Secretary may order debarment upon clear and convincing evidence of (32 C.F.R. 1.604-1(b)(2); *infra*, p. 19):

> A history of failure to perform or of unsatisfactory performance in accordance with the terms of one or more contracts, provided that the previous failure or failures by the Contractor are within a reasonable period of time preceding the determination to debar. Failure to perform caused by acts beyond the control of the Contractor shall not be considered.

Petitioner's performance under the cap supply contract cited by the Secretary (R. 7) had been

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[6] It should be noted that, whereas debarment in the statutorily-prescribed instances is designed as a penalty, different considerations motivate administrative debarment pursuant to the "responsible bidder" provision of the Armed Services Procurement Act. Here, the moving factor is safeguarding the integrity of the military procurement programs, and debarment or suspension "will be for the purpose of protecting the interest of the Government and not for punishment". Section 1.605, ASPR, 32 C.F.R. 1.605.

unsatisfactory to the Navy Department in that Schlesinger had failed to deliver 15,000 caps by May 31, 1955, and again failed to deliver 15,000 caps by June 30, 1955, as required by the terms of the contract (R. 39-40).[5] The contractor's conduct resulted in two distinct actions by the Navy Department. On July 1, 1955, the contracting officer terminated petitioner's contract pursuant to a termination clause in the contract (R. 10); and on August 10, 1955, the Navy Department debarred petitioner from receiving Navy contracts until June 30, 1956, assigning as one ground therefor his default under the above cap contract (R. 6-7).

The action of the contracting officer in terminating the existing contract was subject to a special administrative appeal and, if found erroneous, termination would be deemed to have been made for the convenience of the Government, entitling the contractor to certain prescribed contractual rights and benefits (R. 14).[6] See also 32 C.F.R. 7.103-11. However, the

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[5] The contract further provided that preproduction samples of component parts and completed end items were to be submitted by the contractor for approval by the clothing supply officer pursuant to a prescribed time schedule. Petitioner also failed to submit satisfactory preproduction samples and components as required (R. 25).

[6] The petitioner appealed the contract termination to the Armed Services Board of Contract Appeals where it was affirmed by the Navy panel on October 31, 1955 (R. 42). The panel held that the failure to deliver by May 31, 1955, was without fault or negligence on petitioner's part and that timely delivery for that period was waived by the contracting officer (R. 39), but that the failure to deliver 15,000 caps in June constituted a fresh default enabling the Government

separate determination of the Secretary to debar petitioner from receipt of future contracts, based in part upon his unsatisfactory performance under the terminated contract, was not subject to this appeal procedure, but to the entirely distinct debarment regulations. Schlesinger's efforts, pursuant to those regulations, to have the debarment rescinded (*infra*, pp. 12-13) were unsuccessful, and the initial decision was properly left standing.[9]

3. Petitioner takes issue also with the debarment procedure employed by the Secretary. He contends that his debarment was procedurally defective in that the notice transmitted failed to afford him an opportunity to be heard, as required by regulation, and that, in any event, such an opportunity must antedate debarment (Pet. 13-14, 17).

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to terminate on July 1, 1955 (R. 40). Upon motion for reconsideration, this determination was subsequently affirmed by the entire Board on December 20, 1955 (R. 47). Petitioner is presently contesting the administrative determination by a suit against the Government for breach of contract in the Court of Claims (R. 7-11).

[9] Petitioner attempts to place significance upon the fact that after the debarment action, which was based in part upon the default under the cap supply contract, the Navy awarded a contract for reprocurement to petitioner's surety on the terminated contract and approved the surety company's subcontracting of the work to petitioner (Pet. 6). This, however, is permitted by ASPR 1.603-1, 32 C.F.R. 1.603-1, when it is to the Government's interest to have the debarred contractor do the work. Since the surety was primarily responsible for performance under the latter arrangement, and petitioner had taken steps toward performance under the terminated contract, the Navy Department's reprocurement action, which would minimize both the surety's and petitioner's loss, is understandable.

The regulation in question (Section 1.604-3, ASPR, *infra*, pp. 19-20) provides that the contractor concerned shall be furnished with written notice of debarment within 30 days after the determination to debar has been made—the notice to state the period of debarment, the reasons therefor, and that debarment is to be effective throughout the Department of Defense. It provides, in addition, that the notice of debarment shall "afford the contractor a reasonable opportunity to present information for consideration in his behalf." *Infra*, p. 20. Here, notice was given petitioner of the debarment determination, as required by the regulation (R. 6-7). Thereafter, the contractor was to be afforded a reasonable opportunity to present arguments to alter the Secretary's determination (*infra*, p. 20). The notice did not state that petitioner was to have such an opportunity; but even assuming that such a statement should have been included—which is certainly not clear from the regulation—petitioner, as held by the Court of Appeals (Pet. 17), was afforded that opportunity.

Petitioner does not dispute the affidavit filed by Albert C. Kornblum, Assistant to the General Counsel of the Navy Department (R. 48-49).[10] Mr. Kornblum made the following sworn statements (R. 48-49): Petitioner together with his attorney conferred with

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[10] Mr. Kornblum's official duties included rendering legal advice to the Chief of Naval Material and to personnel on his staff whose duties pertained to the Consolidated List of Debarred, Ineligible and Suspended Contractors. He was, in addition, a member of the Committee authorized to represent the Secretary in taking appropriate action in debarment cases (R. 48).

the affiant at length about the debarment in controversy, stating their position in detail. In addition, petitioner had personal conferences with the Assistant Secretary of the Navy for Material, the Special Assistant for Procurement, the Deputy General Counsel of the Navy, and others—the subject of these conferences being petitioner's debarment and his protests. Mr. Kornblum concluded that the Navy Department officials charged with responsibility in the matter had been fully apprised of petitioner's position (R. 49).[11] Thus, it may be seen, as the Court of Appeals held (Pet. 17), that the "record discloses substantial compliance" with the regulation, petitioner being afforded a reasonable opportunity to present his position.

Petitioner's further assertion that debarment cannot be effected without a prior hearing (Pet. 13-14), is untenable. Plainly, such was not the requirement of the regulation in question (*infra*, pp. 19-20). Nor does the fact that the right to a hearing accrued after the initial agency determination to debar, in and of itself, deprive the contractor of due process, as petitioner implies.[12] Cf., *Fahey* v. *Mallonee*, 332 U.S. 245, 253; *Yakus* v. *United States*, 321 U.S. 414, 436, 443. Moreover, although petitioner stresses the "importance of this aspect of the case", insofar as it bears on future debarment proceedings involving other con-

[11] Petitioner, moreover, protested his debarment to the Comptroller General. The latter concurred in the Secretary's action (R. 2).

[12] This, of course, assumes that petitioner had a legal right to have the Government accept him in the future as a contractor. Cf., *Perkins* v. *Lukens Steel Co.*, 310 U.S. 113.

tractors (Pet. 14), it should be noted that changes effected in the Armed Services Procurement Regulations within the past year obviate the problem under the Act in question.[13]

4. Petitioner's own debarment period has, of course, long since expired (*supra*, p. 3). He asserts, nevertheless, that certiorari should be granted since this case presents an opportunity to limit debarment to instances where specifically authorized by statute, and that this must be effected before administrative debarment "mushrooms to unmanageable proportions" (Pet. 8). These assertions, however, must be viewed in the light of the fact that administrative debarment of persons or firms which contracting agencies of the Government have determined to be non-responsible has been sanctioned by

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[13] Section 1.604-3, ASPR (as revised May 23, 1957) provides as follows:

Notice of Debarment

(a) The firm or individual concerned shall be furnished with a written notice of the proposed debarment stating as a minimum: (i) the fact that debarment is being considered; (ii) the reasons for the proposed debarment; and (iii) the period of time to be afforded to present information for consideration. If debarment is effected, the firm or individual shall be notified in writing within 10 days after determination of debarment has been made. This notice shall (i) reference the earlier notice of proposed debarment, (ii) specify the reasons for debarment, (iii) state the period of debarment, including effective dates, and (iv) advise that the debarment is effective throughout the Department of Defense. If, following the notice of proposed debarment, a determination is made that the debarment will not be effected, the firm or individual shall be notified in writing accordingly. * * *

the Comptroller General over a period of nearly thirty years.[14] See, *e.g.*, 7 Comp. Gen. 547; 14 Comp. Gen. 313; 17 Comp. Gen. 877; Dec. Comp. Gen. B-112861, Nov. 25, 1952. The present case is, to our knowledge, the first judicial contest of such a debarment; and, more significantly, Congress itself has seen fit to intervene only to the extent of *requiring* debarment for certain offenses (*supra*, p. 8).

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[14] The Congressional "watchdog" in this area is the Comptroller General, whose duty it is to investigate such expenditures of public funds to determine whether the relevant statutes and regulations have been complied with and the interests of the Government protected, and to report his findings to the Congress. See, *e.g.*, Act of June 10, 1921, 42 Stat. 25, 26, 31 U.S.C. 53, 54; Act of August 2, 1946, 60 Stat. 837, 31 U.S.C. 60; Act of September 12, 1950, 64 Stat. 834, 31 U.S.C. 65, *et seq.* The Comptroller General specified at an early date that (7 Comp. Gen. 547-8):

> * * * the length of time of such debarment [must be] definitely stated and not unreasonable, and the reasons for the debarment, with a statement of the specific instances of the bidder's dereliction [must be] made of record and a copy thereof furnished the bidder * * *.

Compare, ASPR, §§ 1.604-2, 1.604-3 (*infra*, pp. 19-20).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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JANUARY, 1958

APPENDIX

1. The Armed Forces Procurement Act of 1947, 62 Stat. 21, 41 U.S.C. 151 *et seq.*, provides as follows in pertinent part:

> Sec. 3. Whenever advertising is required—
>
> (a) The advertisement for bids shall be a sufficient time previous to the purchase or contract, and specifications and invitations for bids shall permit such full and free competition as is consistent with the procurement of types of supplies and services necessary to meet the requirements of the agency concerned.
>
> (b) All bids shall be publicly opened at the time and place stated in the advertisement. Award shall be made with reasonable promptness by written notice to that responsible bidder whose bid, conforming to the invitation for bids, will be most advantageous to the Government, price and other factors considered: *Provided*, That all bids may be rejected when the agency head determines that it is in the public interest so to do.

2. The Armed Services Procurement Regulations, 32 C.F.R. 1.100, *et seq.*, provides as follows in pertinent part:

> § 1.600 *Scope of subpart.* This subpart prescribes policies and procedures relating to the debarment of bidders for any cause, ineligibility of bidders under section 1a of the Walsh-Healey Public Contracts Act (41 U.S.C. 35a), and the suspension of bidders for alleged fraud or other criminal conduct.
>
> * * * *
>
> § 1.601-1 *General.* Each Department shall establish and maintain a consolidated list of firms and individuals to whom contracts will not be awarded and from whom bids or proposals will

not be solicited, in accordance with the provisions of this subpart.

* * * *

§ 1.602 *Basis for addition of firms and individuals on list.* The names of firms or individuals shall be included on the list in the following categories:

* * * *

(c) Those which the Secretary of a Department or his authorized representative determines to debar administratively for any of the causes and under all of the conditions set forth in § 1.604.

* * * *

§ 1.604 *Causes and conditions under which departments may debar contractors.* The Secretary of each Department or his authorized representative is authorized to debar in the public interest a firm or an individual for any of the causes and under all conditions set forth in § 1.604-1. Debarment of a firm or individual by the Secretary of a Department or his authorized representative shall operate to debar such firm or individual throughout the Department of Defense.

§ 1.604-1 *Causes for debarment.* (a) Conviction by or a judgment obtained in a court of competent jurisdiction for (1) commission of fraud or a criminal offense as an incident to obtaining, attempting to obtain, or in the performance of a contract, and (2) violation of the Federal anti-trust statutes arising out of the submission of bids or proposals. In the event appeal taken from such conviction or judgment results in reversal, the debarment shall be removed upon receipt of notification thereof. * * *

(b) Clear and convincing evidence of violation of contract provisions, as set forth below, when such violations are of a character regarded by the Secretary of the Department involved or his

authorized representative to be so serious as to justify debarment actions.

(1) Wilful failure to deliver in accordance with the specifications or within the times of delivery provided in a contract.

(2) A history of failure to perform or of unsatisfactory performance in accordance with the terms of one or more contracts, provided that the previous failure or failures by the Contractor are within a reasonable period of time preceding the determination to debar. Failure to perform caused by acts beyond the control of the Contractor shall not be considered.

(3) Violation of the contractual provision against contingent fees.

(4) Violation of the contractual provision against gratuities, as determined by the Secretary of a Department in accordance with the provisions of the gratuities clause.

(c) Debarment for any of the above causes by some other executive agency of the Government. Such debarment may be based entirely upon the record of facts obtained by the original debarring agency, or upon a combination of additional facts with the record of facts of the original debarring agency.

§ 1.604-2 *Period of debarment.* All debarments shall be for a reasonable, definitely stated period of time, commensurate with the seriousness of the offense. As a general rule, a period of debarment shall not exceed 5 years following the date of conviction for fraud or other criminal offense, or 3 years following the date of debarment for any other cause. In the event debarment is preceded by suspension, consideration will be given to such period of suspension in determining the period of debarment.

§ 1.604-3 *Notice of debarment.* (a) The firm or individual concerned shall be furnished with written notice of the debarment within 30 days after determination of debarment has been made. The notice shall state, as a minimum, (1) the

period of debarment, including effective dates; (2) the reasons for debarment, including a statement of the specific instances of dereliction; and (3) that the debarment is effective throughout the Department of Defense. The notice shall also afford the contractor a reasonable opportunity to present information for consideration in his behalf.

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